Supreme Court, U.S.
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No. 02-1235

IN THE

Supreme Court of the United States

GREENVILLE WOMEN'S CLINIC; WILLIAM LYNN, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS SEEKING ABORTIONS,

Petitioners,

v.

COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL; GOVERNOR OF SOUTH CAROLINA; HENRY MCMASTER, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO BRIEF IN OPPOSITION

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Respondents' Brief in Opposition ("Op. Cert.") underscores the importance of the issues presented by this case, interprets the relevant legal standards in ways that create additional circuit splits, and thus provides this Court with additional reasons to grant *certiorari*.

I. Respondents' Assertion That Informational Privacy Rights Can No Longer be Asserted in Facial Challenges to Abortion Regulations Provides an Additional Basis for Granting *Certiorari*.

As Petitioners have explained, the decision below contributes to a significant split in the circuits by upholding section 102(F)(2) ("disclosure provision") of S.C. CODE ANN. REGS. 61-12 (2002) ("R. 61-12" or "the Regulation"), which permits the South Carolina Department of Health and Environmental Control ("DHEC") to review and copy abortion patients' complete medical records without protecting those records from authorized disclosure.[1] Pet. for Writ of Cert. ("Pet.") at 8-20. The Petition demonstrates that the circuit courts are divided both on whether a constitutional right to informational privacy exists, and on how claims under that right should be analyzed.

Respondents admit that under the Regulation unredacted medical records of abortion patients are subject to public disclosure in administrative proceedings, Op. Cert. at 10 n.8, and they make no attempt to refute the existence of a circuit split regarding the existence and scope of a right to informational privacy. Thus, Respondents have simply failed to address the issues presented by this Petition.

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[1] Respondents attempt to distract from the issues presented by characterizing the disclosure provision as a "recordkeeping and reporting requirement." *See, e.g.*, Op. Cert. at 4. Allowing DHEC to copy and remove patient medical records and expose them to public disclosure is not a recordkeeping or reporting requirement, and Petitioners challenge no such requirements.

Instead, Respondents claim that any questions regarding the existence or scope of a right to informational privacy are irrelevant here because this Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), "displaced" that right for abortion patients, at least in the context of facial challenges to abortion restrictions. Thus, according to Respondents, if a law being challenged as a violation of the right to informational privacy regulates abortion, then only the "undue burden" test of *Casey* applies, and the constitutional analysis undertaken in *Whalen v. Roe*, 429 U.S. 589 (1977), has no application.[2]

This argument lacks support from any court, including the Fourth Circuit, and, if accepted, would give abortion patients' medical records less constitutional protection than any other private materials, which would be governed by *Whalen*. Under *Whalen*'s informational privacy analysis, a disclosure requirement will be struck down unless the disclosure is adequately justified and the state provides sufficient confidentiality safeguards for the disclosed material. 429 U.S. at 594-98. By contrast, a disclosure requirement will only be struck down under the undue burden standard if it actually prevents women from "mak[ing] the ultimate decision" to undergo an abortion. *Casey*, 505 U.S. at 877, 879. Affording abortion patients' medical records less privacy protection than other confidential materials is inconsistent with this Court's decisions, which recognize the importance of confidentiality

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[2] In its scant response to Petitioners' claim under *Whalen*, Respondents offer no justification for needing to inspect and copy patients' unredacted records, and they concede that such records may be disclosed in administration proceedings. Op. Cert. at 10 n.8. Nonetheless, Respondents assert that this explicit authorization of disclosure provides insufficient grounds for finding a lack of privacy protection. *Id.* Petitioners submit that where state law explicitly authorizes public disclosure of confidential information, a finding of inadequate privacy protections is not only justified, but inevitable.

in the physician-patient relationship generally and with respect to women's abortion decisions specifically. *See Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986).

Moreover, if Respondents are correct that *Casey* "displaced" abortion patients' right to informational privacy, then this Court should grant *certiorari* to say so. As Respondents' concede, *Casey* made no such holding and therefore litigants and the lower federal courts are unable to rely on that proposition. Op. Cert. at 7 n.6 ("it is not even clear that the State could have pressed the displacement argument with much vigor in the courts below because, at least at a general level, *Whalen* would appear to govern the informational privacy claims in this case"). If *Casey* indeed prevents women from being able to challenge abortion restrictions on their face on any basis other than an undue burden challenge, then that is unquestionably an important constitutional question that should be settled by this Court. *See* SUP. CT. R. 10(c).

II. This Court Should Grant *Certiorari* to Decide Whether States May Require Private Individuals to Form Religious Affiliations.

As Petitioners have demonstrated, and Defendants concede, the Regulation requires physicians to form affiliations with clergy in order to be licensed as abortion providers. *See* Op. Cert. at 18 (R. 61-12 "requires abortion providers to have relationships with" the various "specialists" listed in § 307, which include clergy).[3] Thus, the question for this Court is whether such forced affiliations are facially unconstitutional. They clearly are under this Court's

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[3] Defendants fail to address the patently unconstitutional requirement that the consulting clergy include one Protestant. Pet. at 5, 25.

decisions in *Lee v. Weisman*, 505 U.S. 577, 587 (1992), and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 310-12 (2000), which prohibit the states from forcing individuals to participate in and support religion. *See Lee*, 505 U.S. at 604 (Blackmun, J., concurring, with Stevens, J., O'Connor, J.) (emphasizing that "[a]lthough our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion").[4] As Petitioners explained more fully in their petition, requiring physicians to establish relationships with clergy and make professional referrals to clergy forces them to participate actively in and support religion. Pet. at 24-25.

Faced with this precedent, Respondents claim that under *Bowen v. Kendrick*, 487 U.S. 589 (1988), forced affiliation with religion is constitutionally permissible so long as it is accompanied by forced affiliation with non-religious persons or organizations. Op. Cert. at 16-18. *Bowen* is inapposite, however, because it did not involve state regulation of private conduct. The law challenged there required that certain government funded programs involve both religious and non-religious organizations in their delivery of services.[5] In upholding that element of the challenged funding scheme, this Court held it "reflect[ed] the statute's successful

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[4] The State's assertion that the "no set of circumstances" test of *United States v. Salerno*, 481 U.S. 739, 745 (1987), applies to Establishment Clause claims is refuted by *Bowen v. Kendrick*, 487 U.S. 589 (1988), the case on which Defendants so heavily rely. In *Bowen*, this Court applied the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), without mention of *Salerno*. *Bowen*, 487 U.S. at 602.

[5] Moreover, it is not apparent that the statute challenged in *Bowen* actually required inclusion of religious organizations by grantees, or simply permitted inclusion of religious groups along with a variety of other groups. *Bowen*, 487 U.S. at 605-7.

maintenance of 'a course of neutrality among religions, and between religion and non-religion.'" *Bowen*, 487 U.S. at 607 (citation omitted). Thus, government programs may involve religious organizations so long as the government is neutral among religions and as between religion and non-religion.

Bowen has no application to the regulation of private conduct, where this Court has never permitted a government to require individuals to support or participate in religion or to maintain a position of neutrality among religions or between religion and non-religion. There is certainly a significant difference between coercing private individuals to affiliate with religious personnel and requiring neutrality as to religion in government-funded programs. *See Doe v. Maher*, 432 U.S. 464, 475-476 (1977) (holding that there is a "basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy"). The Regulation does the former by imposing criminal penalties on physicians who fail to form the religious affiliations required by the clergy provision. *See* S.C. CODE ANN. § 44-7-340 (2002) (violation of the Regulation is a misdemeanor). *Bowen* is simply not instructive in this context.

Should this Court agree with Respondents that *Bowen* controls the outcome of Petitioners' Establishment Clause claim, then the Court should grant *certiorari* to settle this important issue. *See* SUP. CT. R. 10(c). This is particularly necessary because the circuit courts have not interpreted *Bowen* in the manner Respondents suggest, and have instead continued to follow the rule that states may not require individuals to participate in and support religion. *See, e.g.*, *Kerr v. Farrey*, 95 F.3d 472, 479-80 (7th Cir. 1996) (striking down prison policy coercing inmate to participate in religion); *Warner v. Orange County Dep't of Prob.*, 115 F.3d 1068, 1075-77 (2d Cir. 1996) (same).

In light of the plain unconstitutionality of the clergy

provision, Respondents now half-heartedly attempt to disown DHEC's interpretation of section 307. *See* Op. Cert. at 14 and n.10. That interpretation, which is described more fully in the Petition, Pet. at 4-5, was given at trial by George Moore, who is not just "one individual," as Respondents suggest, Op. Cert. at 14, but the principal drafter of the Regulation and the Director of Outpatient and Home Care in DHEC's Division of Licensing. Mr. Moore testified at trial in his official capacity, and DHEC has never disputed Mr. Moore's interpretation nor denied that his testimony reflects the agency's position. Instead, Respondents have repeatedly defended the constitutionality of that interpretation. *See, e.g.*, Defs.' Mem. in Opp. to Pls.' Request for Relief at 21-26 (filed in district court Aug. 6, 2001); Brief of Appellees/Cross-Appellants at 33-39 (filed in court of appeals Dec. 27, 2001). Notably, Respondents have neither adopted nor attempted to defend the Fourth Circuit's interpretation of the clergy provision, which is plainly incorrect, and have instead conceded that the Regulation requires physicians to establish relationships with the various specialists listed in section 307. *See* Op. Cert. at 18. For the reasons explained above and in the Petition, such a requirement is facially unconstitutional.

III. The Regulation Allows Area Hospitals to Prevent Abortion Facility Licensing on the Basis of Opposition to Abortion.

As the Petition explains, the Regulation violates abortion providers' right to due process by granting area hospitals standardless authority to prevent abortion facility licensing by denying admitting privileges to abortion providers. Pet. at 26-28. Respondents attempt to defend this grant of authority by claiming that it is adequately constrained by due process requirements. Respondents are incorrect.

Neither public nor private hospitals are subject to any due

process constraints with respect to their decision to become certified as facilities suitable for the provision of abortions. Yet the Regulation requires an abortion provider to hold admitting privileges at a hospital that has obtained that certification, or to have a documented transfer arrangement with such a hospital and a written consulting agreement with a physician who has admitting privileges at such a hospital. *See* Pet. at 5. Thus, abortion providers' licensing is contingent upon the hospital's act of complete discretion as to whether to become certified for abortion provision.

Moreover, in South Carolina, private hospitals can deny admitting privileges for any reason at all, *Modaber v. Culpeper Mem'l Hosp.*, 674 F.2d 1023 (4th Cir. 1982), and public hospitals can deny privileges in accordance with a hospital rule or policy opposing abortion in the facility. *See Huellmantel v. Greenville Hosp. Sys.*, 402 S.E.2d 489, 492 (S.C. Ct. App. 1991) (holding that "due process requires only that a public hospital not exclude a physician from practice therein by rules or acts which are unreasonable, arbitrary, capricious or discriminatory"). Federal constitutional law permits private and public hospitals to prohibit the performance of abortions in their facilities, *see Webster v. Reprod. Health Servs.*, 492 U.S. 490, 509-10 (1989), and South Carolina law explicitly protects private hospitals that refuse to permit the performance of abortions in their facilities. S.C. CODE ANN. § 44-41-40 (2002). Any hospital in South Carolina can follow the legislature's lead by adopting a policy disfavoring the performance of abortions in the facility. Such a hospital could then prevent abortion providers from obtaining abortion facility licenses by denying admitting privileges in accordance with that policy.

Thus, the Regulation grants hospitals authority to prevent abortion facility licensing on grounds not available to the State. Such a delegation is impermissible. *See Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) (holding that

the state may not delegate to a private party authority that the state does not have); *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1109-10 (5th Cir. 1997) (striking down a delegation of standardless veto power over minors' abortions to judges, because it allowed judges to deny abortions in circumstances in which the state must approve them); *Hornsby v. Allen*, 326 F.2d 605, 609-10 (5th Cir. 1964) (holding that licensing decisions must be based on established standards so that potential licensees are not subject to uncontrolled discretion of licensing authorities).[6]

Finally, Respondents rely on the Eighth Circuit's decision in *Women's Health Ctr. of West County, Inc. v. Webster*, 871 F.2d 1377 (8th Cir. 1989), for the proposition that admitting privilege requirements must be constitutional because this Court has upheld requirements that abortion providers be licensed physicians. That parallel, however, is improperly drawn because medical boards are subject to strict standards governing their exercise of authority. Unlike the hospitals here, medical boards may only grant or deny a license to practice medicine on the basis of individual merit. *See, e.g., Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 238-39 (1957). Moreover, to the extent the *Webster* upholds a grant of governmental authority that may be exercised on the basis of whim or opposition to abortion, it conflicts with *Danforth*, *Causeway* and *Hornsby*, and this Court should grant *certiorari* to resolve that conflict. *See* SUP. CT. R. 10(a).[7]

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[6] Respondents also argue that this Court should not address Petitioners' due process claim until the Regulation's delegation of licensing authority imposes an undue burden on women. Respondents essentially claim that *Casey* eclipsed all other constitutional rights in challenges to abortion regulations. But *Casey* never so held, and abortion providers have a right, like anyone else, to due process of law.

[7] The assertion that Petitioners have experienced no difficulty in obtaining admitting privileges is patently false. Dr. Lynn was unable to

IV. The Regulation Grants DHEC Inspectors Unbridled Discretion to Define New Requirements for Abortion Facilities.

As the Petition demonstrates, section 103(C) of the Regulation conflicts with decisions of this Court and the circuit courts by allowing DHEC inspectors to define new requirements of the Regulation on a case by case basis and to cite and fine facilities for violations of those new requirements. Pet. at 28-30. This provision violates "the more important aspect of vagueness doctrine... -- the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (internal quotation omitted). Because section 103(C), like the law challenged in *Kolender*, "contains no standard for determining" what DHEC's best practices are, it "vests virtually complete discretion in the hands of" state authorities to determine whether individuals are in compliance with the law. *See Kolender*, 461 U.S. at 358. Although respondents claim that the Regulation contains adequate standards for enforcement, this contention finds no support in the Regulation, which lacks any standards governing how inspectors define "best practices," and contains only a general list of factors to be considered in imposing penalties. *See* R. 61-12 § 103(E).

Respondents counter the obvious notice problem presented by section 103(c) by pointing to the fact that monetary violations cannot be imposed for a first violation of a "best practice," and after that first violation, the provider is

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obtain privileges at a local hospital in Greenville because he does not reside there, and it took him months to obtain a written agreement with a physician who had such privileges because area physicians feared harassment and violence if they associated themselves with an abortion provider. Dec. of William Lynn, M.D. ¶ 8 (filed Feb. 26, 2001).

on notice of the requirements of the law.[8] This very same argument was made and rejected in *City of Chicago v. Morales*, 527 U.S. 41, 56-60 (1999), where this Court held that the fact that an enforcement officer will announce the terms of a vague law prior to imposing sanctions does not alleviate the lack of notice problem created by such a law. *Id.* As this Court explained, "[s]uch an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law." *Id.* at 59. Thus, Section 103(c) violates both aspects of the vagueness doctrine.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant their petition for a writ of *certiorari*.

Respectfully submitted,

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[8] A "best practices" violation subjects the abortion provider to monetary penalties the day after it is announced. R. 61-12 § 103.